In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-908

ROBERT E. COTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, who pleaded guilty to mailing obscene material, contends that the material was not obscene.

Petitioner pleaded guilty in the United States District Court for the Northern District of Texas to four counts charging that he sent obscene films, magazines, and circulars through the mails, in violation of 18 U.S.C. 1461. He was sentenced to four concurrent terms of two years' imprisonment. The court of appeals affirmed *per curiam*. 470 F. 2d 755. On June 25, 1973, this Court granted the petition for a writ of certiorari, vacated the judgment, and remanded to the court of appeals for further consideration in light of *Miller* v. *California*, 413 U.S. 15, and companion cases. 413 U.S. 915. After further consideration in light of those cases, the court of appeals again affirmed the conviction (Pet. App. A).

Before pleading guilty, petitioner moved to dismiss the indictment, urging that as a matter of law the materials involved were not obscene (App. 26-59).[1] This motion was denied by the district court after a hearing (App. 113-114). Petitioner then requested the district court to make findings of fact and conclusions of law on the question of obscenity, and later filed a petition for writ of mandamus and a separate petition for a writ of prohibition in the court of appeals to compel the district court to make findings. Both petitions were denied (App. 116). The case was then set for trial.

Prior to trial, however, petitioner moved to withdraw his plea of not guilty and to enter a plea of guilty to all four counts of the indictment (App. 241-245). After questioning petitioner pursuant to Rule 11, Fed. R. Crim. P., the court found that there was a factual basis for the plea and accepted it (App. 245-260).

Petitioner's counsel indicated that petitioner was considering contending on appeal that the materials were not obscene, and the court emphasized repeatedly that neither the court nor the prosecution agreed that the guilty plea reserved that question (App. 270-274, 282). Both petitioner and his counsel expressly noted that they understood the judge's statement that "I think that the plea of guilty settles the question of obscenity" (App. 272). The court allowed petitioner to place in the record the materials which were the subject of the indictment and copies of allegedly comparable materials which petitioner contends were found by this Court to be non-obscene (App. 265-269).

Petitioner here contends that the materials should not be reviewed under the *Miller* standards for judging ob-

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[1] "App." designates the appellant's appendix in the court of appeals.

scenity (essentially an *ex post facto* argument); and that the materials are not obscene under the former *Roth-Memoirs*[2] standards, as a matter of law.[3] As we pointed out in our opposition to petitioner's first petition (*Cote* v. *United States,* No. 72-1120), however, the trial court correctly held that petitioner's guilty plea constituted a waiver of all defenses except those going to jurisdiction or the constitutionality of the statute.

Petitioner's plea of guilty admitted all elements of the offense, including the obscenity of the materials. *United States* v. *Fragus,* 422 F.2d 1244 (C.A. 5), opinion supplemented, 428 F.2d 1211 (obscenity case); see also *United States* v. *Clark,* 459 F.2d 977 (C.A. 8), certiorari denied, 409 U.S. 880; *United States* v. *Cox,* 464 F.2d 937, 940-942 (C.A. 6).[4] Indeed, at sentencing, petitioner's counsel conceded that petitioner "violated the law" and that "[h]e has committed a crime" (App. 288).

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[2]*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413.

[3]The court of appeals, on remand, found that the materials were obscene under both standards (Pet. App. A).

[4]Petitioner's reliance on the fact that there was a plea of guilty in *Haynes* v. *United States,* 390 U.S. 85, is misplaced. There the defendant consistently contended that the statutes were unconstitutional on their face while petitioner's claim is that 18 U.S.C. 1461 is unconstitutional, as applied here, since these materials are allegedly protected by the First Amendment (Pet. 24-25). Petitioner's "constitutional" claim is thus simply a restatement of his contention that the materials are not obscene. Even if petitioner were in fact challenging the constitutionality of 18 U.S.C. 1461 on its face, that claim has been repeatedly rejected by this Court. E. g., *Roth* v. *United States,* 354 U.S. 476; *United States* v. *Reidel,* 402 U.S. 351, 353-357; *United States* v. *Thirty-Seven Photographs,* 402 U.S. 363, 376.

This Court remanded on petitioner's previous petition for certiorari for further consideration in light of *Miller* and its companion cases, and the court of appeals reaffirmed after reviewing the materials under both the *Miller* and the *Roth-Memoirs* standards. Petitioner, however, is in a different position from defendants who had gone to trial under the *Roth-Memoirs* standards, and who had the obscenity of their materials tested by the trier of fact and the courts of appeals under those standards.

This Court concluded in *Miller* that new standards were necessary, and that defendants appealing convictions under the old standards were entitled to a review under the new standards. Petitioner, on the other hand, was convicted on his counseled admission in open court that he committed the crime charged against him. Since there was no trial, the subject materials were never in evidence and no definition of obscenity was applied to the materials. Accordingly, petitioner should not be allowed at this point in effect to withdraw his guilty plea and put the government to its proof under any definition of obscenity. *McMann* v. *Richardson,* 397 U.S. 759, 773-774.

In these circumstances, there is no occasion for the Court to defer disposition of this petition pending the decision in *Hamling* v. *United States,* No. 73-507, certiorari granted January 14, 1974, which involves the question of the standards to be applied to pre-*Miller* conduct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.